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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re PGH Partnership

Serial No. 75/457,661

Thomas M. Galgano and Daniel P. Burke of Galgano & Burke
for PGH Partnership.

D. Beryl Gardner, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney).

Before Hanak, Bucher and Holtzman, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant, a general partnership of Nevada, seeks
registration of the mark "PLAYERS CHOICE BLACKJACK" (with
the word "Blackjack" disclaimed) for goods identified in
the application as "casino game tables for card games of
chance used exclusively in commercial gaming
establishments," in International Class 28.¹

The Trademark Examining Attorney has finally refused
registration under Section 2(d) of the Trademark Act, 15

¹ Serial No. 75/457,661, filed March 26, 1998 based upon
applicant's allegation of a *bona fide* intention to use the mark
on or in connection with the goods in commerce.

U.S.C. §1052(d). The basis for the refusal is that the mark "PLAYERS CHOICE POKER" has already been registered for "poker-style card games," in International Class 28², so that when applicant's mark is used on or in connection with the identified goods, it would be likely to cause confusion or mistake by consumers, or to deceive consumers as to the source of applicant's and registrant's respective goods.

Applicant appealed the refusal of registration and timely filed an appeal brief. The Examining Attorney then filed a brief within the time set by the Board; an oral hearing was not requested.

We affirm the refusal to register.

Our determination under Section 2(d) is based upon our analysis of all of the probative facts in evidence that are relevant to factors bearing on the issue of likelihood of confusion. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of that issue in this case, key considerations are the similarities of the marks and the relatedness of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We consider, first, the marks.

² Registration No. 2,129,556 issued January 13, 1998. The registration sets forth a date of first use of July 5, 1997.

Applicant argues that in spite of the commonality of the "PLAYERS CHOICE ..." prefix, its mark, "PLAYERS CHOICE BLACKJACK," is different in sound, appearance and connotation from registrant's mark, "PLAYERS CHOICE POKER."

In contrast, the Trademark Examining Attorney contends that confusion as to source is likely precisely because the two marks are similar in sound, appearance and meaning.

The test, when comparing the involved marks, is not whether applicant's mark can be distinguished from registrant's mark when subjected to a side-by-side comparison,³ but, rather, whether the marks are sufficiently similar in terms of their overall commercial impression that confusion is likely to result as to the source or sponsorship of the goods offered under the respective marks.

Both marks herein begin with the same words "Players Choice." As the Trademark Examining Attorney points out, the term "Poker" is descriptive of registrant's poker cards

³ Such a comparison is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks that must determine, due to fallibility of memory, whether confusion as to source or sponsorship is likely. The proper emphasis is on the average purchaser who normally retains a general rather than a specific impression of marks. See Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981) and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

and has been disclaimed in the cited registration. Similarly, the word "Blackjack" is descriptive of applicant's casino game tables, and has been disclaimed apart from the mark as shown.

With respect to the marks, it is well settled that marks must be compared in their entireties. Nevertheless, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ..." 224 USPQ at 751.

Here, the dominant element of both marks is "Players Choice." The other wording in the two marks, i.e., "POKER" and "BLACKJACK," is descriptive or generic matter which has been disclaimed by registrant and applicant, respectively, and which contributes very little to the commercial impressions created by the two marks. Any dissimilarity in the marks that might result from their use of different

descriptive or generic wording is greatly outweighed by the marks' basic similarity, i.e., their shared use of the suggestive term PLAYERS CHOICE. In view thereof, while differences admittedly exist between the marks when viewed on the basis of a side-by-side comparison, when considered in their entirety, applicant's "PLAYERS CHOICE BLACKJACK" mark is substantially similar to registrant's "PLAYERS CHOICE POKER" mark.

Moreover, even if consumers were to notice the differences in the respective marks, they may well believe that due to the shared term PLAYERS CHOICE, the gaming tables offered by applicant under its "PLAYERS CHOICE BLACKJACK" mark represents a new product from the same source as the company which offers poker cards under the "PLAYERS CHOICE POKER" mark.

Hence, when compared in their entirety, we find the marks are similar in sound and appearance and are likely to create substantially similar impressions upon the minds of prospective purchasers.

We turn next to the goods. In its brief, applicant spends no time even discussing the relationship between poker-style card games and casino game tables for card games of chance. However, the Trademark Examining Attorney has made of record several third-party registrations

demonstrating that the types of goods sold by both applicant (gaming tables for card games) and registrant (card games) can come from the same source. Third-party registrations which individually list two different items and which are based on use in commerce are evidence that the listed goods are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988) at note 6.

Moreover, this certainly comports with our assumptions about channels of trade for these respective goods. In the absence of a specific limitation in the registration certificate, we must assume that because these goods travel in all the usual channels of trade for such goods, registrant uses the mark on card games marketed, for example, directly to casinos. In re Elbaum, 211 USPQ 639 (TTAB 1981). Consequently, those who make purchasing decisions for casinos would be buying as essential components of such gaming establishments both playing cards and game tables for card games.

Both the Trademark Examining Attorney and applicant focus much of their argumentation on the number and nature of similar marks in use on similar goods. Applicant contends:

The casino and recreational game fields, in general, are diluted with marks containing "PLAYER'S CHOICE", including variations thereof." [applicant's appeal brief, p. 3]

The Trademark Examining Attorney admits that the "PLAYERS CHOICE ..." (or the possessive forms, "PLAYER'S CHOICE ..." or "PLAYERS' CHOICE ...") formative is indeed used in third-party registrations. Specifically, this formative is part of composite trademarks on the federal Register for used golf balls, dart boards and billiard tables, as well as being contained within service marks for basketball training camps and the retailing of video games. While these uses may well demonstrate that "Players Choice" is suggestive for a variety of sporting good items, none of these other uses share the close relationship with playing cards that applicant's goods have, and hence, with the exception of registrant's playing cards sold to casinos, all would seem to move in different channels of trade than do applicant's goods. Accordingly, permitting the cited registration to issue to registrant in 1998 in the face of these prior third-party registrations, while denying applicant the right of publication on the basis of registrant's mark, is neither inconsistent nor unfair.

In conclusion, based upon our review of the relevant du Pont factors, we find that applicant's application is barred from registration by the existence of Registration No. 2,129,556.

Decision: The refusal under Section 2(d) of the Act is affirmed.

E. W. Hanak

D. E. Bucher

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board